IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICGTION

INCOME TAX REFERENCE NO. 413 of 1988

M/s. Conart Builders (P) Ltd... Applicant.

vs.

The Commissioner of Income Tax .... Respondent

Ms. Asifa Khan for Applicant.
Mr. Ashok Kotangale, Sr. Counsel for Respondent.

CORAM: V. C. DAGA
AND
A. S. AGUIAR JJ.
Date: 14th July, 2005.

P. C.:

1. By this reference under section 256 (1) of the Income Tax Act , 1961, arising out of I.T.A No. 5102(Bom)/1984 for the Assessment Year 1980-81, the Income Tax Appellate Tribunal has referred the following question of law for the opinion of this court:

> "Whether on the facts and circumstances of the case, the Tribunal was justified in law in upholding the dis-allowance of Rs.20,478/- u/s.

40A (8) of the Income Tax Act 1961?

2. The facts of the case are that the assessee filed return of income which was accompanied by the computation of income. On that basis the Income Tax Officer computed the total income of the assessee before adjustment of carry forward of loss at Rs.97,475/- which was rounded off to Rs.97,480/-. In doing so, the Income Tax Officer added back Rs.20,478/- being 15% of interest of Rs.1,36,525/- under section 40A(8) of the Income Tax Act. The assessee went in appeal before the Commissioner of Income Tax (Appeals) against the order of the Income Tax Officer and contended that the Income Tax Officer was not justified in making a dis-allowance of Rs.20,478/- without any discussion in that regard. The learned Commissioner of Income-tax (Appeals) considered the claim of the assessee and deleted the addition to the finding that the deposits were in fact in the nature of current account and, therefore, provisions of sec. 40A(8) are not applicable as per the decisions in the case of M. E. P. Ltd., for the Assessment Year 1976-77.

3. Aggrieved by the said order, the Revenue took up the matter in appeal before the Tribunal and the Tribunal allowed the appeal as follows:

> "3. On careful consideration of the rival submissions, in the light of the material placed on our record, we see

merit in the appeal of the Revenue. Firstly, the assessment was made and the computation of the income was done on the basis of the income was done on the basis of the assessee's computation. In such a case, there need not be any discussion and in fact, the assessee cannot be aggrieved by such assessment order. Even in any case, the amount has been treated by the assessee as covered by the provisions of sec. 40A(8) of the Income Tax Act and automatic disallowance was made at 15% of such interest payment. When the matter was brought in appeal before the CIT (A), a claim was made that the deposits were in the nature of current account and the learned CIT (A) allowed the claim in that light. In such a case, we cannot appreciate the contention of the assessee that the deposits were in the nature of loans secured by the creation of mortgage etc., in terms of Explanation (b) (ix) to sec. 40A(8). Since this matter has not been agitated before the first appellate authority nor before the I. T. O., at the assessment stage, we cannot take into account these evidences particularly when the assessee has current liability to the tune of

Rs.19,29,262/- towards sundry creditors over and above the loans and advances shown at Rs.4,87,000/- which included unsecured loans of Rs.1,09,000/-. We, therefore, set aside the order of the CIT (A) and restore that of the I. T. O. In doing so, we respectfully follow the reasoning given by the Special Bench in the case of Naloomal Shorimal Sachdev Rangwalla Pvt. Ltd. (14 I.T. D.248)".

4. On the above factual matrix at the instance of the assessee the Tribunal has sought adjudication from this court on the question mentioned in the opening part of this order.

5. The factual matrix referred to herein-above go to show that the Income Tax Officer applying the provisions of section 40A(8) of the Income Tax Act applicable at the relevant time disallowed 15% interest on Rs.1,36,525/- . This dis-allowance was not challenged by the assessee before the first appellate court, with the result, the order of dis-allowance became final against the assessee. The assessee sought to challenge the dis-allowance before the Tribunal for the first time, that too, in the appeal filed by the revenue. In that appeal objection was raised on behalf of the revenue contending that the assessee cannot be said to be an aggrieved person as the assessment was made on the computation of the income made by

the assessee itself. The Tribunal upheld the contention of the revenue and recorded a positive finding that the objection at the instance of the assessee cannot be allowed. In other-words, the Tribunal held that the assessee could not be said to be an aggrieved person. In that view of the matter it was not necessary for the Tribunal to revolve on the issue involved. If the appeal was not maintainable, in that event no reference would arise from the order of the Tribunal.

6. In this view of the matter we hold that no reference could have been made by the Tribunal under section 256(1) of the Income Tax Act, and return this reference un-answered. This reference stands disposed of with no order as to costs.

(V. C. DAGA J.)

(A. S. AGUIAR J.)

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